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APPLICATION NO.	FILING DATE	FIRST NAMED INVENTOR	ATTORNEY DOCKET NO.	CONFIRMATION NO.
10/707,230	11/28/2003	Saul Katz	45496.20	1229

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EDWARD YOO C/O BENNETT JONES
1000 ATCO CENTRE
10035 - 105 STREET
EDMONTON, ALBERTA, AB T5J3T2
CANADA

EXAMINER	
PRATT, HELEN F	

ART UNIT	PAPER NUMBER
1761	

DATE MAILED: 04/11/2006

Please find below and/or attached an Office communication concerning this application or proceeding.

Office Action Summary	Application No.	Applicant(s)	
	10/707,230	KATZ ET AL.	
	Examiner	Art Unit	
	Helen F. Pratt	1761	

-- The MAILING DATE of this communication appears on the cover sheet with the correspondence address --

Period for Reply

A SHORTENED STATUTORY PERIOD FOR REPLY IS SET TO EXPIRE 3 MONTH(S) OR THIRTY (30) DAYS, WHICHEVER IS LONGER, FROM THE MAILING DATE OF THIS COMMUNICATION.

- Extensions of time may be available under the provisions of 37 CFR 1.136(a). In no event, however, may a reply be timely filed after SIX (6) MONTHS from the mailing date of this communication.
- If NO period for reply is specified above, the maximum statutory period will apply and will expire SIX (6) MONTHS from the mailing date of this communication.
- Failure to reply within the set or extended period for reply will, by statute, cause the application to become ABANDONED (35 U.S.C. § 133). Any reply received by the Office later than three months after the mailing date of this communication, even if timely filed, may reduce any earned patent term adjustment. See 37 CFR 1.704(b).

Status

1)☒ Responsive to communication(s) filed on *20 March 2006*.

2a)☒ This action is **FINAL**. 2b)☐ This action is non-final.

3)☐ Since this application is in condition for allowance except for formal matters, prosecution as to the merits is closed in accordance with the practice under *Ex parte Quayle*, 1935 C.D. 11, 453 O.G. 213.

Disposition of Claims

4)☒ Claim(s) *1-6* is/are pending in the application.

4a) Of the above claim(s) _____ is/are withdrawn from consideration.

5)☐ Claim(s) _____ is/are allowed.

6)☒ Claim(s) *1-6* is/are rejected.

7)☐ Claim(s) _____ is/are objected to.

8)☐ Claim(s) _____ are subject to restriction and/or election requirement.

Application Papers

9)☐ The specification is objected to by the Examiner.

10)☐ The drawing(s) filed on _____ is/are: a)☐ accepted or b)☐ objected to by the Examiner.

Applicant may not request that any objection to the drawing(s) be held in abeyance. See 37 CFR 1.85(a).

Replacement drawing sheet(s) including the correction is required if the drawing(s) is objected to. See 37 CFR 1.121(d).

11)☐ The oath or declaration is objected to by the Examiner. Note the attached Office Action or form PTO-152.

Priority under 35 U.S.C. § 119

12)☐ Acknowledgment is made of a claim for foreign priority under 35 U.S.C. § 119(a)-(d) or (f).

a)☐ All b)☐ Some * c)☐ None of:

1.☐ Certified copies of the priority documents have been received.

2.☐ Certified copies of the priority documents have been received in Application No. _____.

3.☐ Copies of the certified copies of the priority documents have been received in this National Stage application from the International Bureau (PCT Rule 17.2(a)).

* See the attached detailed Office action for a list of the certified copies not received.

Attachment(s)

1) ☐ Notice of References Cited (PTO-892)
2) ☐ Notice of Draftsperson's Patent Drawing Review (PTO-948)
3) ☐ Information Disclosure Statement(s) (PTO-1449 or PTO/SB/08) Paper No(s)/Mail Date _____.
4) ☐ Interview Summary (PTO-413) Paper No(s)/Mail Date. _____.
5) ☐ Notice of Informal Patent Application (PTO-152)
6) ☐ Other: _____.

DETAILED ACTION

The following is a quotation of 35 U.S.C. 103(a) which forms the basis for all obviousness rejections set forth in this Office action:

> (a) A patent may not be obtained though the invention is not identically disclosed or described as set forth in section 102 of this title, if the differences between the subject matter sought to be patented and the prior art are such that the subject matter as a whole would have been obvious at the time the invention was made to a person having ordinary skill in the art to which said subject matter pertains. Patentability shall not be negatived by the manner in which the invention was made.

Claims 1-6 are rejected under 35 U.S.C. 103(a) as being unpatentable over Painter et al. (Cereal Foods World) or Wolf et al. US 2004/0197380 A1 or Gilles et al. (6,248,375) and Wilbert (5,776,887).

Painter discloses a protein bar composition as in claim 1, containing protein, fat and a carbohydrate in which the total carbohydrate (COH) content is a little less than 45% and the glycemic index is lower than 50 (page 05, Table II (under Protein Bars). However, no patentable distinction is seen in a difference of 2% absent a showing of unexpected results. Therefore, it would have been obvious to use amounts close to that claimed absent anything unobvious.

The protein source is soy protein as in claim 5 and the carbohydrate source is fructose as in claim 6 (page 5, Table II, Protein Bar.). Therefore, it would have been obvious to use known sources of protein and fructose as disclosed by Painter et al.

Wolf et al. disclose a composition containing COH, fat and protein in which the COH content is from 25 to 55% and the glycemic index (GI) is lower than 50 because fructose is disclosed and complex carbohydrates such as oats and rice crisps and modified starch, and polydextrose (page 10, 0116). The GI is seen to be within the claimed amounts as in claims 3 and 4 absent a showing to the contrary. Claims 1-4 differ in that the highest level of COH is 55 and not above 55 as in claim 3. However, no patentable distinction is seen in a difference of 55 and above 55 absent a showing of unexpected results. Therefore, it would have been obvious to use amounts close to that claimed absent anything unobvious.

Soy protein isolate is disclosed and calcium caseinate and whey protein as in claim 5, and fructose as in claim 6. Therefore, it would have been obvious to make a product as claimed as shown by Wolf et al.

Giles et al. disclose a composition containing the claimed ingredients with a carbohydrate content greater than 45% as in claims 1-3. The reference does not say what the glycemic index is, but foods with a low GI are disclosed such as fructose and fiber, the composition would have a GI at within the claimed amounts (col. 14, lines 5-30 and col. 15, lines 30-55). Therefore, it would have been obvious to make a product with amounts of COH as disclosed with the claimed GI index.

Soy protein, fructose containing syrup and fructose are disclosed as in claims 5-6. Therefore, it would have been obvious to use known ingredients in the claimed composition.

Wilbert et al. disclose a composition containing various amounts of the claimed ingredients as in claims 1-6. The carbohydrate content is seen to have been more than 45% as in claims 1-3 because rolled oats, which is a complex carbohydrate with a low GI is used in predominant amounts and the reference discloses 62% carbohydrates (col. 8, lines 40-60.). Also, the GI is seen to have been within the claimed amounts of 1-4 due to the use of complex carbohydrates absent a showing to the contrary. Protein is found in the peanuts, which is different than that of claim 5. However, as protein performs a known function the same as other sources of protein, no patentable distinction is seen in the types of protein at this time. Therefore, it would have been obvious to use known ingredients, and known amounts of COH and a known GI as disclosed by Wilber et al.

Claim 7 is rejected under 35 U.S.C. 103(a) as being unpatentable over Painter et al. or Wolf et al. or Gilles et al. as applied to claims 1-6 above, and further in view of Foster-Power International Table of Glycemic Index.

Claim 7 further requires that the composition is a food item with particular amounts of ingredients. However, it is seen that it would have been within the skill of the ordinary worker to determine the amounts of carbohydrate and the glycemic index of various foods and to make a composition with known ingredients which was within the claimed limitations especially as applicants have provided in their Information Disclosure Statement a table of Foods which shows the glycemic index of various foods. Attention is invited to In re Levin, 84 USPQ 232 and the cases cited therein,

which are considered in point in the fact situation of the instant case, and wherein the Court stated on page 234 as follows:

This court has taken the position that new recipes or formulas for cooking food which involve the addition or elimination of common ingredients, or for treating them in ways which differ from the former practice, do not amount to invention, merely because it is not disclosed that, in the constantly developing art of preparing food, no one else ever did the particular thing upon which the applicant asserts his right to a patent. In all such cases, there is nothing patentable unless the applicant by a proper showing further establishes a coaction or cooperative relationship between the selected ingredients which produces a new, unexpected, and useful function. In re Benjamin D. White, 17 C:C.P.A (Patents) 956, 39 F.2d 974, 5 USPQ 267; In re Mason et al., 33 C.C.P.A. (Patents) 1144, 156 F.2d 189, 70 USPQ 221. Also, Painter discloses the value of using the GI to determine which foods would have been desirable for people and that "an energy bar could be designed with COH's that provide a low glycemic response using fructose and that the GI can be accurately estimated from food (page 04, 1st col. 2nd paragraph, page 07, first para., col. 2.). Therefore, it would have been obvious to choose various foods with known amounts of carbohydrate and a known glycemic index in which to make a food composition.

ARGUMENTS

Applicant's arguments filed 3-20-06 have been fully considered but they are not persuasive. Applicants have presented an affidavit to swear behind some of the references. However, the affidavit is not persuasive because the letters which are

used to show applicants' date of invention do not contain information as to the claimed invention, i. e. the claimed composition.

Applicants argue as to the Wibert reference Wilbert discloses a significant amount of sucrose, which has a high glycemic index (GI). However, the claims do not exclude the use of sucrose. Certainly the amount of sugar would help determine its GI. One granola bar of Wibert discloses that sucrose is an optional ingredient (col. 8, lines 40-60). Nothing has been shown that even the examples of Wibert have glycemic indexes higher than claimed. The claims to Wibert et al. also disclose very wide ranges of ingredients from which amounts could have been picked to make a particular GI. Certainly, the concept of a low glycemic index is well known, as in the Atkins diet, which uses a lot of protein and no carbohydrates in an effort to keep ones blood sugar level. Applicants are more able to determine if the products of Wibert are or are not within their claimed amount of less than 50 GI.

THIS ACTION IS MADE FINAL. Applicant is reminded of the extension of time policy as set forth in 37 CFR 1.136(a).

A shortened statutory period for reply to this final action is set to expire THREE MONTHS from the mailing date of this action. In the event a first reply is filed within TWO MONTHS of the mailing date of this final action and the advisory action is not mailed until after the end of the THREE-MONTH shortened statutory period, then the shortened statutory period will expire on the date the advisory action is mailed, and any extension fee pursuant to 37 CFR 1.136(a) will be calculated from the mailing date of

the advisory action. In no event, however, will the statutory period for reply expire later than SIX MONTHS from the mailing date of this final action.

Any inquiry concerning this communication or earlier communications from the examiner should be directed to Helen F. Pratt whose telephone number is 571-272-1404. The examiner can normally be reached on Monday to Friday from 9:30 to 6:00.

If attempts to reach the examiner by telephone are unsuccessful, the examiner's supervisor, Mr. Milton Cano, can be reached on 571-272-1398. The fax phone number for the organization where this application or proceeding is assigned is 703-872-9306.

Information regarding the status of an application may be obtained from the Patent Application Information Retrieval (PAIR) system. Status information for published applications may be obtained from either Private PAIR or Public PAIR. Status information for unpublished applications is available through Private PAIR only. For more information about the PAIR system, see http://pair-direct.uspto.gov. Should you have questions on access to the Private PAIR system, contact the Electronic Business Center (EBC) at 866-217-9197 (toll-free).

Hp 4-6-06

H. Pratt

HELEN PRATT
PRIMARY EXAMINER